IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 3933 OF 2005

Bhika Tukaram Mokal .. Petitioner.

vs.

Khandelwal Digambar Panch Trust. .. Respondent.

Mr. P.N. Joshi for Petitioner.

Coram: J.N. PATEL, J.

Date: 26th July, 2006.

P.C.

. Heard.

2. The petitioner has challenged the order passed below Exhibit-1 in Misc. Application No. 2/2003 by the 2nd Ad-hoc Additional District Judge, Malegaon, dated 28.4.2005 rejecting his application for condonation of delay with costs.

3. The petitioner (original defendant in Regular Civil Suit No. 285/77) submits that a decree came to be passed on 31.7.1984 by which he was directed to hand over possession of the suit property to the respondent which is a public trust. The said appeal was pending for hearing being Civil Appeal No. 204/84 before the

District Court at Nashik which came to be renumbered as Civil Appeal No. 31/90. While it was taken up for hearing in spite of repeated opportunities being given the learned counsel appearing for the petitioner before the lower appellate court did not get any instructions in the matter and, therefore, tendered a retirement purshis which resulted in dismissal of the appeal for want of prosecution on 19.10.2002 and that is how an application for restoration came to be filed.

4. The learned counsel appearing for the petitioner submits that the lower appellate court has not taken into consideration the fact that the advocate for the appellant has not given due notice to the appellant before seeking his discharge and has filed retirement purshis on the basis of which the appeal was dismissed in default. Another contention of the learned counsel for the petitioner is that the Court failed to consider that the petitioner has sustained paralytic attack and for that reason was unable to attend the Court and instruct his counsel and that the lower appellate court has ignored this fact which is supported by medical certificate and which goes to indicate that it was beyond the control of the petitioner and for no fault of his appeal has been dismissed and, therefore, it deserves to be restored for which the petitioner has offered to pay costs.

5. On going through the impugned order, this Court

finds that the lower appellate court was justified in dismissing the application for condonation of delay for restoring the appeal for which the lower appellate court has given cogent reasons.

6. The plea taken by the petitioner is self-contradictory i.e. on the one hand the petitioner claims that he was not given any notice by his advocate and in the next breadth he says that as he was suffering from paralytic attack he could not contact him. The lower appellate court has rightly observed that the petitioner has enjoyed the suit land for 30 years i.e. the period his appeal was pending in the lower appellate court. In so far as the contention of the petitioner that he has suffered paralytic attack which is somewhere between 3.6.2002 to 21.12.2004 that he was under treatment of one Dr. Bansude. Even if the medical certificate is accepted, it was the responsibility of the petitioner to have communicated with his advocate. It is not the case of the petitioner that he has no other member in the family to take care of the litigation.

7. The learned counsel for the petitioner has submitted that the age of the petitioner is 80 years whereas the medical certificate mentions his age as 68 years. Therefore, this Court does not think it proper to interfere with the impugned order in the exercise of its supervisory jurisdiction under Article 227 of the

Constitution of India as the impugned order does not suffer from any error or illegality. The petition is dismissed with costs. Needless to say that as the petition is dismissed in limine, all the interim orders passed earlier do not survive.

(J.N. Patel,J.)

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